No. 48970-8-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LA INVESTORS, LLC d/b/a LOCAL RECORDS OFFICE and ROBERTO ROMERO, a/k/a JUAN ROBERTO ROMERO ASCENCION, individually and as a Member and Manager of LA INVESTORS, LLC, and on behalf of the marital community comprised of Roberto Romero and Laura Romero; and LAURA ROMERO, individually and as a Member and Manager of LA INVESTORS, LLC, and on behalf of the marital community comprised of Roberto Romero and Laura Romero,

Appellants.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
Honorable Mary Sue Wilson

APPELLANTS' OPENING BRIEF

Jason W. Anderson, WSBA No. 30512
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
Attorneys for Appellants

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I. INTRODUCTION

L.A. Investors, LLC, doing business as Local Records Office (LRO), sent mailers to recent property purchasers in Washington, offering for sale a customized "property profile" and copy of the recorded deed for the addressee's property. The simple, text-only mailer neither stated nor reasonably implied that it was from a government agency or was a bill, and instead disclosed clearly and conspicuously that it was *not* from a government agency and was *not* a bill. Less than 4% of recipients bought from LRO, while only a tiny fraction of a percent of recipients complained and only slightly more than half a percent of purchasers requested a refund.

The State sued LRO and the Romeros under Washington's Consumer Protection Act (CPA), chapter 19.86 RCW, alleging that LRO's mailer was "deceptive" in violation of RCW 19.86.020 in that it had a "capacity to deceive a substantial portion of the public" to conclude it was from a government agency or was a bill. The superior court denied partial summary judgment to LRO and the Romeros and granted summary judgment to the State based on a misconception, urged by the State, that capacity to deceive is a question of law for the court, when it is actually a question of fact. The court entered a permanent injunction and a judgment for more than $3.6 million in civil penalties, restitution, attorney's fees, and costs.

The State's evidence did not establish as a matter of law that LRO's mailer had the capacity to deceive a substantial portion of the public. Declarations from 25 recipients who did not read the mailer or were not deceived and an irrelevant, inadmissible, baseless, and rebutted "expert" opinion did not establish the capacity to deceive or even create a genuine issue of material fact on the issue. Indeed, because a reasonable trier of fact applying the correct legal standard could conclude only that LRO's mailer did *not* have the capacity to deceive a substantial portion of the public, this Court should reverse the judgment and remand for entry of summary judgment in favor of LRO and the Romeros.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error.

1. The superior court erred in granting the State summary judgment. CP 1180-85.

2. The superior court erred in entering judgment for the State. CP 1300-14.

3. The superior court erred in denying LRO and the Romeros partial summary judgment dismissing the State's allegations that LRO's mailer had the capacity to deceive a substantial portion of the public to conclude it was from a government agency or was a bill. *See* CP 1180-85.

B. Statement of Issues.

1. Where a solicitation's capacity to deceive a substantial portion of the public under RCW 19.86.020 is a question of fact under Washington law, did the superior court err in analyzing it as a question of law for the court?

2. Where the State's evidence failed to establish that LRO's mailer had the capacity to deceive a substantial portion of the public to conclude it was from a government agency or was a bill, did the superior court err in granting the State summary judgment and entering a permanent injunction and a judgment for civil penalties, restitution, and other relief?

3. Where LRO's mailer neither stated nor reasonably implied that it was from a government agency or was a bill but stated exactly the opposite in clear and conspicuous disclosures, did the superior court err in denying LRO and the Romeros partial summary judgment that LRO's mailer did not have the capacity to deceive a substantial portion of the public to conclude it was from a government agency or was a bill, and should this Court direct entry of summary judgment in favor of LRO and the Romeros?

4. If this Court affirms the determination of CPA violations, should it vacate in part the imposed penalties because the superior court abused its discretion in imposing a $10 penalty for each of the 247,303 mailers discarded by consumers without

responding—the same penalty the court imposed for each mailer that resulted in a sale?

III. STATEMENT OF THE CASE

A. LRO used targeted, direct-mail solicitation to offer its product and service to recent purchasers of real property in Washington.

L.A. Investors, LLC, is a family business operated by Juan Roberto Romero Ascension (a.k.a. "Roberto Romero"). Doing business as "Local Records Office," the company obtains and sells information about real properties across the United States.[1] LRO used direct-mail solicitation to sell a property-related product and service in Washington. It offered (1) a customized property information report called a "property profile" and (2) a document retrieval service in that it would provide a copy of a recorded deed on file with a county auditor. *See* CP 718. One who accepted LRO's offer by sending money to buy the materials would receive a property profile and a copy of the deed for his or her real property. CP 718. LRO fulfilled orders with property profiles and copies of deeds it obtained from AgentPro247.com, an information service for real-estate professionals. CP 711, 924.

A property profile contained the sort of information a real-estate agent might provide clients and a consumer might wish to

[1] L.A. Investors has other business activities, such as providing income tax preparation services in Bellflower, California, doing business as "Local Tax." CP 92.

know about a residence or investment property. *See* CP 921-23. The profile listed property characteristics and transaction history for the subject property; contained detailed information on comparable sales, neighborhood foreclosure activity, and demographics (*e.g.*, age distribution, average incomes); identified the owners of other nearby properties; and included a detailed crime report and information about local schools. CP 462, 921-23. LRO offered the entire package, including the property profile and copy of the last recorded deed, for $89. CP 718.

LRO used targeted mailing lists intended to achieve a higher response rate than a mailer sent to the general public; the lists included only persons who recently purchased or refinanced real property. CP 710, 921-23. LRO sent its mailers to those persons because they would more likely be interested in the information than the general public and thus more likely respond.[2] CP 921-23. LRO obtained its mailing lists from AgentPro247.com, usually twice monthly. CP 711.

LRO sent its mailers to residents of Washington and other states. As a repository for consumer responses, LRO rented a mailbox in each state where it did business. CP 918. Mr. Romero

[2] Mr. Romero acknowledged in deposition that the information in a property profile would be more useful to consumers if they could obtain it before buying a property, but there was no way for LRO to identify prospective buyers. CP 923. Mr. Romero further testified that real-estate agents serving prospective buyers typically do not provide the information in the profiles because "it costs them money to get that information"—money they are unwilling to spend unless necessary. CP 924.

put the mailboxes in state capitols (including Olympia) to simplify selection and minimize the need for research as he did not know the major cities in each state. CP 918-20. He testified: "I have to put it somewhere. I'm not going to look all over for where to put it. I just put it in the capitol." CP 918-19.

B. LRO's mailer was plainly a solicitation and not designed to mislead recipients or resemble a bill from a government agency.

LRO designed its mailer to be clear and simple. Mr. Romero testified, "For me it was very important that there was no doubts when they received the document what it was, and by no means do I want any kind of confusion." CP 873. This was evident in the design and text of LRO's mailing envelope and enclosed mailer, an example of which is found at CP 713 (envelope) and 718-19 (mailer), attached as Appendix A to this brief.

1. The mailing envelope.

LRO sent its mailers in plain, white, #10 business envelopes (4-1/8" x 9-1/2") with all text printed in black. CP 713. LRO did not print the name or logo of any county, state, county agency, or elected official on its envelopes; they were devoid of any pictures, graphics, or logos. CP 713, 790-92. The return address stated "LOCAL RECORDS OFFICE" followed by the address for LRO's mailbox in Olympia, Washington. CP 713. Under the

return address was printed: "IMPORTANT PROPERTY INFORMATION[;] RESPOND PROMPTLY." CP 713. First-class postage was pre-printed in the upper-right corner. CP 713. Printed under the postage was (1) a warning about mail tampering and (2) immediately underneath, in the same-sized font, the following text: "THIS IS NOT A GOVERNMENT DOCUMENT." CP 713.

2. The mailer.

Inside the envelope was a single-page, double-sided mailer and return envelope. CP 718-19, 747. The mailer had no pictures, graphics, or logos—only text and, in later versions, small icons indicating payment options—all printed in black. CP 628-31, 718-19.

The mailer's text communicated LRO's offer of a copy of the recorded deed for the identified property and a property profile:

> Local Records Office provides a copy of the only document that identifies [the addressee] as the property owner of [address] by a recently recorded transferred title on the property.
>
> Local Records Office provides a property profile where you can find the property address, owner's name, comparable values, and legal description or parcel identification number, property history, neighborhood demographics, [and a] public and private schools report.
>
> ...
>
> For a complete property profile and an additional copy of the only document that identifies you as a property owner

> usually called [a] deed, please detach coupon and return with an $89 processing fee in the envelope provided. You will receive your documents and report within 21 business days.
>
> Upon receipt of your processing fee, your request will be submitted for documents preparation and reviewed. If for any reason your request for deed and property profile cannot be obtained, your processing fee will be immediately refunded.

CP 718. In the middle of the page, omitted from the above quotation, was a table of several items of publicly available information about the addressee's real property. *See* CP 718. Printed at the bottom of the first page was a detachable coupon to submit with payment, which would allow LRO to order the property profile and deed for the correct property. CP 718.

The top of the second page (back of page one) further described LRO's offer, making clear that anyone can personally obtain a copy of a deed from county records:

> **Local Records Office:** In the United State[s] anyone can have access to the records of any Real Property. The Real Property is usually recorded in the County records where Local Records Office runs powerful on-line searches to find the Deed of millions of people throughout The United States and gathers at the same time several Characteristics of the property such as: Property Characteristics, Property History, Sale Loan Amount, Assessment and Tax Information, Nearby Neighbors, Comparable Sale Date, Neighborhood Demographics, Private and Public Schools reports, Plat Map, and others. Those are sent to thousands of new property owners.

CP 719. Most of the second page defined common terms relating to real property and property ownership. CP 719; *see also* CP 134-35.

The mailer contained three prominent disclosures, all in the same-sized font as all other text—or larger.

First, text printed prominently at the top of the first page and in the largest-used font stated that LRO was "NOT ASSOCIATED WITH ANY GOVERNMENT AGENCY" and that anyone can obtain a copy of a deed from county records:

> THIS SERVICE TO OBTAIN A COPY OF YOUR DEED OR OTHER RECORD OF TITLE IS NOT ASSOCIATED WITH ANY GOVERNMENT AGENCY. YOU CAN OBTAIN A COPY OF YOUR DEED OR OTHER RECORD OF YOUR TITLE FROM THE COUNTY RECORD IN THE COUNTY WHERE YOUR PROPERTY IS LOCATED.

CP 718.[3]

Second, text printed at the bottom of the first page, just above the detachable coupon, reiterated in the same-sized font as the main text that the mailer was not from a government agency and was a solicitation, not a bill:

> LOCAL RECORDS OFFICE IS NOT AFFILIATED WITH THE COUNTY IN WHICH YOUR DEED IS FILED IN, NOR AFFILIATED WITH ANY GOVERNMENT AGENCIES. THIS OFFER SERVES AS A SOLICITING FOR SERVICES AND NOT TO BE INTERPRETED AS BILL DUE. THIS PRODUCT OR SERVICE HAS NOT

[3] The original version of the mailer sent by LRO starting in July 2012 used the phrase "FOR UP TO $89" as the concluding words of this disclaimer, but LRO deleted this phrase in the fall of 2012. *See* CP 715, 748.

> BEEN APPROVED OR ENDORSED BY ANY GOVERNMENTAL AGENCY, AND THIS OFFER IS NOT BEING MADE BY ANY AGENCY OF GOVERNMENT. THIS IS NOT A BILL. THIS IS A SOLICITATION AND YOU ARE UNDER NO OBLIGATION TO PAY THE AMOUNT STATED, UNLESS YOU ACCEPT THIS OFFER.

CP 718.

Third, the following disclaimer was printed at the bottom of the second page:

> DISCLAIMER: * Local Records Office is not affiliated with any State or the United States or the County Records. Local Records Office is an analysis and retrieval firm that uses multiple resources that provide supporting values, deeds and evidence that is used to execute a property reports [sic] and deliver a requested deed.
>
> Local Records Office is not affiliated with the county in which your deed is filed in, nor affiliated with any government agencies. You can obtain a Copy of your Deed or other Record of your Title from the County Recorder in the County where your property is Located. In [sic] the price varies depending on each county rate. This product or service has not been approved, or endorsed by any government agency, and this offer is not being made by agency of government. This is not a bill; you are under no obligation to pay the amount stated, unless you accept this offer. ...

CP 719.

C. Few recipients complained about LRO's mailer, and even fewer requested a refund after accepting its offer.

In July 2012 through May 2016, LRO sent 256,998 mailers to Washington residents via U.S. Mail, offering its property

profiles and deed-retrieval service as a package. CP 1182, 1304. During that time, 9,695 recipients accepted LRO's offer—a response rate of 3.8%. *See* CP 330, 748. Only 62 of those consumers requested refunds. CP 487-89. Those who requested refunds received them promptly, without hassle or delay. *See, e.g.,* CP 487-90, 617, 620, 635, 646, 649, 658, 661, 667, 674, 687, 702. Of those who requested refunds, 36 also complained to the State. CP 1043. An additional 65 individuals complained without ever having sent money to LRO. CP 1043. The total complaint rate (101 out of 256,998) was a tiny fraction of one percent.

D. Seeking summary judgment after filing this action, the State submitted declarations from recipients who were not deceived or did not read the mailer and a putative expert's personal opinion, unsupported by empirical studies.

In November 2013, the attorney general's office for the state of Washington filed this action. The State alleged on several grounds that LRO's mailer was deceptive in violation of the CPA, RCW 19.86.020, including because it had the capacity to deceive a substantial portion of the public to conclude it was from a government agency or was a bill. CP 5, 14-19.

Two years later, in November 2015, the State moved for summary judgment. CP 319. Characterizing LRO's business as a "scam," CP 342, the State asked the superior court to declare that LRO violated the CPA by sending "deceptive mailers," enter

a permanent injunction, and order LRO and the Romeros to pay civil penalties, full restitution to each consumer "who purchased a copy of their deed," and the State's attorney's fees and costs. CP 320-22.

The State maintained that the only disputed issue was whether LRO's mailer had the capacity to deceive a substantial portion of Washington consumers, which the State asserted was "a question of law." RP (1/15/2016) 7; *see also* RP (1/15/2016) 14 ("[W]hether or not something has the capacity to deceive is a question of law. There's no jury trial."); CP 320. The State maintained that LRO's product had "no value whatsoever" and posed the rhetorical question, "[W]hat person would purchase a copy of their deed for $89...?" RP (1/15/2016) 13-14; RP (2/12/2016) 25. The State also asserted, "No reasonable consumer knows what they're purchasing here." RP (1/15/2016) 29.

Ostensibly to establish capacity to deceive as a matter of law, the State submitted declarations from 25 recipients of LRO's mailer in Washington. A common thread in these declarations was that those who read the mailer were not deceived and those who merely glanced at it had inconsistent recollections and made wide-ranging assumptions about its contents. At least six of the declarants were not deceived as they correctly concluded the mailer was a solicitation and never responded to LRO, CP 642-43, 657-56, 666-68, 689-90, 694-96, 698-99, while the impressions of

the remaining 19 declarants varied widely, with several leaping to conclusions lacking any rational connection with the mailer.

Of those declarants who did not read the mailer, at least five assumed there was a problem with a real-estate transaction that had already closed, which paying $89 to LRO would somehow cure. CP 640-41, 648-49, 660-61, 666-68, 691-92. Three others assumed the mailer was a tax bill. CP 637-38, 651-52, 686-87. Four assumed the sender would assess a fine or other monetary penalty for failing to pay the $89, with one concluding her real property could be *seized* if she did not pay the $89. CP 616-17, 637-38, 651-52, 701-02.

Some declarants recalled nonexistent elements in the mailer. Four recalled seeing graphics on the envelope, and two specifically recalled it was a "green pictorial." CP 660-61, 663-64, 666-68, 676-77. No graphics or color were on any of LRO's envelopes or mailers, CP 446, 713, 718-19, and no envelope or mailer was attached to any of the recipient declarations except one by an assistant attorney general. *See* CP 625-32.

In addition to the recipient declarations, the State submitted a report from its expert witness, psychology professor Anthony R. Pratkanis, Ph.D. CP 745. He opined that LRO "engages in a deceptive sales practice in which targeted consumers are led to believe that they have received a bill from either a government agency or title company and/or that they

need to have a copy of a deed to prove ownership of their home[.]" CP 749. Dr. Pratkanis conceded in deposition that this was merely his personal opinion as he had conducted no empirical studies on LRO's mailer, such as surveys or focus groups, nor did he interview any consumers. CP 992-93. Instead, he merely reviewed the mailer itself and the complaints received by the attorney general's office and compared the response rate achieved by LRO's mailer with statistics for mailers sent to non-targeted mailing lists. CP 748, 756-58, 993.

Dr. Pratkanis had no opinion as to the number of recipients who supposedly misunderstood LRO's mailer. CP 725. Nor did he have any opinion as to the number of recipients who were initially confused but figured out the mailer was a solicitation and not a bill *by simply reading it*. CP 726.

LRO's expert witness, Albert V. Bruno, Ph.D., disputed Dr. Pratkanis's opinion that LRO's mailer had a capacity to deceive a substantial portion of the public that it was from a government agency or was a bill. *See* CP 1044-48. He specifically rebutted several of Dr. Pratkanis's conclusions, including about the response rate and his premises for presuming to speak to how reasonable consumers would perceive the mailer. CP 1040-47. Dr. Bruno noted that LRO's complaint rate as "extremely low" and showed that it was significantly lower than would generally be expected for a marketing communication. CP 1042-43. In any

event, the few complaints received were largely irrelevant as the State's expert witness, conceded that "[c]onsumer complaints are *not useful* for identifying misleading and deceptive marketing communications." CP 373 (emphasis added).

LRO and the Romeros sought partial summary judgment that the mailer lacked the capacity to deceive a substantial portion of the public to conclude it was from a government agency or was a bill. CP 821-40.

E. Before this case, the only other tribunal to adjudicate the same issue found after a bench trial that LRO's mailers were *not* deceptive.

Although the State submitted inadmissible hearsay evidence that LRO had stipulated to discontinue offering its products and services in two states, CP 403-04, 406-07, no tribunal had previously found LRO's mailers to be deceptive. But after a two-day bench trial, an Indiana trial court determined in 2014 under Indiana's Deceptive Consumer Sales Act that LRO's mailers were *not* deceptive. CP 994-1007.

F. The superior court denied LRO partial summary judgment, granted the State summary judgment, and entered a judgment for civil penalties and attorney's fees exceeding $3.6 million.

The superior court granted the State summary judgment. CP 1180-85. The court adopted the State's position that capacity to deceive a substantial portion of the public was a question of law for the court and determined LRO's mailer had such capacity:

> Ultimately, having reviewed this question and deliberated over it for some time and determining that the question is a question of law for the court..., I am finding that on summary judgment that this mailer does have the capacity to deceive a substantial portion of the public.

RP (2/12/2016) 13-14; *see also* CP 1182-83. The court ruled that LRO's solicitation was unfair and deceptive in violation of the CPA and that LRO "created the deceptive net impression that Defendants' solicitation was from a governmental agency or was a bill that Washington consumers were obligated to respond to or pay." CP 1182-83, 1305. The court opined that LRO's product was "of little or no value." RP (3/16/2016) 65. The court permanently enjoined LRO and the Romeros from engaging in further CPA violations. CP 1184-85, 1307.

The court found that LRO had sent 256,998 mailers to Washington consumers between June 2012 and February 2016, and 9,696 bought from LRO. CP 1303-04. The court imposed a civil penalty of $10 for each solicitation sent to Washington by LRO, regardless of whether the recipients responded to LRO, totaling $2,569,980 in penalties. CP 1307; *see also* RP (3/16/2016) 67. In determining the penalty amount, the court found as a matter of law that LRO and Roberto Romero acted in bad faith and that the penalty of $10 per sent mailer was necessary to eliminate any benefits derived from engaging in deceptive practices. CP 1308; *see also* RP (3/16/2016) 63. But in addition to the penalties, the court ordered full restitution of $89 to each

purchaser, amounting to $856,981, and ordered LRO to retain and pay for a claims administrator to distribute the funds. CP 1308-09. The court also awarded the State its attorney's fees of $176,806.73 and costs of $19,903.53. CP 1312-13.

The total judgment amounted to $3,603,767.73, with interest accruing at 12% per annum. CP 1301. The court held Mr. Romero personally liable for the judgment under the responsible corporate officer doctrine. CP 1506. *See State v. Ralph Williams N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322, 553 P.2d 423 (1976). LRO and the Romeros timely appealed. CP 1315.

IV. ARGUMENT

A. This Court reviews the grant or denial of summary judgment de novo.

This Court reviews the grant or denial of summary judgment de novo, engaging in the same inquiry as the trial court. *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230 (2013); *Indoor Billboard/ Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 69-70, 170 P.3d 10 (2007). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

The reviewing court considers all facts and reasonable inferences in the light most favorable to the nonmoving party and will affirm a summary judgment only if it determines, based on all the evidence, that reasonable persons could reach but one conclusion. *Indoor Billboard*, 162 Wn.2d at 70. The moving party must show that there is no genuine issue as to any material fact. *Id.* A fact question may be determined as a matter of law where reasonable minds could reach only one conclusion based on the admissible evidence. *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985). A trial is necessary if there is a genuine issue as to any material fact. *Morris v. McNicol*, 83 Wn.2d 491, 497, 519 P.2d 7 (1974).

On a motion for summary judgment, courts do not weigh evidence or assess witness credibility. *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006). Admissible expert opinion testimony on an ultimate issue of fact is sufficient to create an issue as to that fact, precluding summary judgment. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979). Summary judgment is thus precluded where the parties' experts materially disagree. *See, e.g., DiBlasi v. City of Seattle*, 136 Wn.2d 865, 879, 969 P.2d 10 (1998) (reversing summary judgment and remanding for trial given the factual dispute evident from the "contrasting opinions" of the parties' experts on whether water was diverted from its natural

course); *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 106 P.3d 258 (2005) (reversing summary judgment and remanding for trial given conflicting expert opinions on the significance of construction defects).

B. The capacity of a solicitation to deceive a substantial portion of the public is a question of fact.

The CPA partially modified the common law rule of *caveat emptor* ("let the buyer beware"), consistent with the First Amendment and the Federal Trade Commission Act (FTC Act, 15 U.S.C. § 45). *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 783-84, 719 P.2d 531 (1986). The State alleged here that LRO's mailers violated RCW 19.86.020, which prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." To establish a violation of this section, the State must prove (1) an unfair or deceptive act or practice (2) occurring in trade or commerce (3) that impacts a public interest. *See id.* at 785; *Nuttall v. Dowell*, 31 Wn. App. 98, 110, 639 P.2d 832, 840 (1982).

Once it proves a violation of RCW 19.86.020, the State may obtain an injunction, an order for restitution, and a judgment for the State's recoverable fees and costs. RCW 19.86.080(1), (2). Additionally, the court may impose a civil penalty of up to $2,000 per violation if the defendant is not "a publisher, printer or distributor of any...advertising medium who publishes, prints or

distributes, advertising in good faith without knowledge of its false, deceptive or misleading character." RCW 19.86.140. Under the First Amendment, a remedy for deceptive advertising must be no broader than necessary to prevent deception. *Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964, 972 (7th Cir. 1979).

Addressing the State's first element of proof, the superior court ruled that whether LRO's mailer was deceptive was a question of law, citing *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009). CP 1182; *see also* RP (2/12/2016) 13-14. But the method by which the State sought to prove deceptiveness here involved a threshold question of fact, which the court erroneously ruled was a question of law and decided as such. *See* CP 1010, 1018, 1182; RP (2/12/2016) 13-14.

An unfair or deceptive act can be established in three ways. The State may establish that the defendant: (1) violated a statute the legislature has declared to be a per se violation of the CPA, (2) committed an act or practice not regulated by statute but in violation of public interest, or (3) committed an act or practice that has the capacity to deceive a substantial portion of the public. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). The State here chose the third method of proof. And under Washington law, whether an act or practice has the capacity to deceive a substantial portion of the public is a question

of fact. *Holiday Resort Comm'ty Ass'n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 226-27, 135 P.3d 499 (2006), review denied, 160 Wn.2d 1019 (2007). *Accord Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 318, 308 P.3d 716 (2013) ("Whether an alleged act is unfair or deceptive presents a question of law. ... Whether an unfair act has the capacity to deceive a substantial portion of the public is a question of fact."); *Behnke v. Ahrens*, 172 Wn. App. 281, 292, 294 P.3d 729 (2012).

Contrary to the State's position in superior court, the Supreme Court did not hold otherwise in *Panag*. Although capacity to deceive was in that case susceptible to determination as a matter of law, *see* 166 Wn.2d at 47-50, the court recognized it is not so in every case when it cited *Holiday Resort* with approval, noting that in *Holiday Resort* it was a "*question of fact* whether there was a capacity to deceive [a] substantial portion of [the] public." *Id*. at 48 (emphasis added), citing *Holiday Resort*, 134 Wn. App. at 227 (reversing a summary judgment and remanding for trial on capacity to deceive). *See also Guijosa v. Wal–Mart Stores, Inc.*, 144 Wn.2d 907, 921, 32 P.3d 250 (2001) (holding that "the jury was free to determine what could constitute an unfair and deceptive act or practice" where deceptive statements were alleged).

If there were any doubt about whether capacity to deceive is a question of fact or law under Washington law, it would be

resolved with reference to federal decisions interpreting the FTC Act, by which Washington courts are to be guided in construing the CPA. RCW 19.86.920 ("It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters."); *Panag*, 166 Wn.2d at 47. Federal decisions are in accord that capacity to deceive is a fact question. *See, e.g., Giant Food, Inc. v. FTC*, 322 F.2d 977, 982 n.12 (D.C. Cir. 1963) ("The meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive, are questions of fact[.]"); *Carter Prods., Inc. v. FTC*, 268 F.2d 461, 496 (9th Cir. 1959), citing *Kalwajtys v. FTC*, 237 F.2d 654, 656 (7th Cir. 1956) ("The meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive, are questions of fact[.]").

Hence, in granting the State summary judgment, the superior court determined a fact question without a trial. But given the evidence presented on summary judgment, this question can be determined as a matter of law only in LRO's favor.

C. The superior court erred in determining as a matter of law that LRO's solicitation had the capacity to deceive a substantial portion of the public.

It is not unlawful to send a solicitation via U.S. Mail offering products or services. Direct mail is a common form of marketing. CP 1038. More advertising dollars are spent on direct mail than almost any other advertising medium. CP 1036. The CPA in RCW 19.86.020 prohibits only *deceptive* solicitations.

A solicitation is deceptive if it has the capacity to deceive a substantial portion of the public. *See Smith v. Stockdale*, 166 Wn. App. 557, 564, 271 P.3d 917 (2012), citing *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 30, 948 P.2d 816 (1997). Such capacity may exist either if the communication is literally false or a reasonable consumer is likely to infer additional facts that are false. *See Panag*, 166 Wn.2d at 50; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 cmt. d (1995). A statutory violation occurs if reasonable consumers will likely be misled as to a fact of material importance. *Walker*, 176 Wn. App. at 318.

A communication has the capacity to deceive a substantial portion of the public if the "*net* impression" it conveys is likely to mislead a reasonable consumer. *Panag*, 166 Wn.2d at 50 (emphasis added); *see also Smith*, 166 Wn. App. at 564. A communication unlikely to mislead a reasonable consumer does not violate RCW 19.86.020. *Panag*, 166 Wn.2d at 50. "When the tendency to deceive or mislead turns...upon the inferences to be

drawn from the representation or upon a choice among several possible interpretations, direct evidence of the meaning attached to the representation by the relevant audience may be necessary to establish a likelihood of deception." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 cmt. d.

A "reasonable consumer" for purposes of evaluating capacity to deceive is an "ordinary consumer acting reasonably under the circumstances." *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1161-62 (9th Cir. 2012). Although this standard includes unsophisticated consumers, it excludes persons who are "careless and imperceptive" or have "a propensity for unbounded flights of fancy." *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674, 676 (2d Cir. 1963).

Capacity to deceive is judged by viewing the communication as a whole, without emphasizing isolated words or phrases apart from their context. *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989); *Sterling Drug*, 317 F.2d at 674; *see also Panag*, 166 Wn.2d at 50. Determining whether the *net* impression conveyed by a solicitation would likely mislead a reasonable consumer thus requires *weighing* any potentially confusing elements against those elements that are clear or serve to correct an otherwise misleading impression. As the court does not weigh evidence on a summary judgment motion, this inquiry

should not ordinarily lend itself to determination on summary judgment:

> Whether a particular format is deceptive...is necessarily a highly fact-and-context-specific question. The deceptive tendency of the format, and the degree to which disclosures counteract such tendency, are disputed matters which can only be resolved by a fact-finder on a full trial record.

FTC v. Direct Mktg. Concepts, Inc., 569 F. Supp. 2d 285, 305 (D. Mass. 2008) (denying summary judgment to the FTC on the deceptiveness of the format of an infomercial containing express disclosures), *aff'd*, 624 F.3d 1 (1st Cir. 2010).

1. The State did not establish that LRO's mailer had the capacity to deceive a substantial portion of the public to conclude it was from a government agency.

To establish that LRO's mailer had the capacity deceive a substantial portion of the public that it was from a government agency, the State either had to quantify the alleged deceived, which it made no attempt to do, or establish that the mailer would likely deceive reasonable consumers, which it failed to do either through recipient declarations or expert opinion.

(a) The State made no attempt to quantify the alleged deceived members of the public.

Over 96% of recipients did not respond to LRO's mailer, and the State received few complaints relative to the 256,998 mailers sent. Several of the 25 complainants who provided

declarations understood LRO's mailer for exactly what it was—a solicitation. The State offered no basis to extrapolate based on the few complainants who misunderstood the mailer. A "few isolated examples" are insufficient to support a finding—let alone establish as a matter of law—that an appreciable number of reasonable consumers were deceived. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025-26 (9th Cir. 2008); *see also Davis*, 691 F.3d at 1162 ("[A] representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." (Citation omitted.)).

(b) The State's recipient declarations did not establish capacity to deceive a substantial portion of the public.

Having insufficient empirical evidence to establish capacity to deceive a substantial portion of the public, the State premised its case on the notion that a reasonable consumer who skimmed and *did not read* LRO's mailer would assume it was from a government agency and mindlessly respond with payment. None of the State's recipient declarants who accepted LRO's offer by sending money testified that he or she read the document beyond the words "Please Respond By" and "$89"; rather, they plainly made assumptions with little or no basis in fact. Tellingly,

Dr. Pratkanis defined "reasonable consumer" to include those who were "skimming [the mailer] *or not reading it at all*." CP 724 (emphasis added).

Indeed, only one who read almost *none* of the mailer's substance could conclude it was from a government agency, let alone a notice of a problem with a title transfer or tax bill. The mailer contained no false or misleadingly ambiguous statements. The text of the offer stated plainly that, for $89, LRO would provide a copy of a property profile and deed for the subject property. Multiple clear and conspicuous disclosures stated that LRO was "NOT ASSOCIATED WITH ANY GOVERNMENTAL AGENCY" and its mailer was "NOT A GOVERNMENT DOCUMENT" and was a "SOLICITATION" and "NOT A BILL." CP 713, 718, 751.

LRO's mailer was an offer, the acceptance of which formed a contract LRO had to perform. *See Am. Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 673, 292 P.3d 128 (2012), citing *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. Yakima*, 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981) ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree

in a manner invited or required by the offer.").[4] And absent fraud, deceit, or coercion, a party who has entered into a contract "will not be heard to declare that he did not read it, or was ignorant of its contents." *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 799, 64 P.3d 22 (2003) (upholding the dismissal of a breach of contract claim against a title insurer where the insured accepted with her initials the insurer's amendment of the legal description for the property), citing *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973).

Thus, where, as here, a solicitation invited the recipient to accept an offer by remitting payment and thus forming a contract, courts have applied the principle that one who accepts an offer is bound by its written terms even if he or she chooses not to read them. *See, e.g.*, *In re Vistaprint Corp. Mktg. & Sales Pracs. Lit.*, 2009 WL 2884727 at *4-8 (S.D. Tex. 2009) (dismissing claim that membership offer on website was deceptive where its written terms "clearly and unequivocally refuted" their alleged deceptive nature); *Baxter v. Intelius, Inc.*, 2010 WL 3791487 at *4 (C.D. Cal. 2010) (stating on similar facts and result, "A customer who accepts is bound by the terms of a disclosure even if he or she chooses not to read it.").

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[4] *See also* RESTATEMENT (SECOND) OF CONTRACTS § 24 ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.").

The failure to read clear and conspicuous terms before consummating a transaction cannot properly be found reasonable as a matter of law. And LRO cannot be held liable for deception based on the assumptions of those who would act on a written communication without reading it—at least not without a trial. At minimum, a genuine issue of material fact exists as to the reasonableness of' the assumptions made by the State's declarants, such that they cannot be deemed as a matter of law to represent reasonable consumers and, thus, "a substantial portion of the public."

(c) The State's expert's opinions were irrelevant and inadmissible and, in any event, baseless.

Under ER 702, expert testimony that does not help the trier of fact resolve any material fact issue is irrelevant and inadmissible. *Stedman v. Cooper*, 172 Wn. App. 9, 16, 292 P.3d 764 (2012). Expert testimony is "helpful" only if it concerns matters beyond the common knowledge of the average layperson. *State v. Farr-Lenzini*, 93 Wn. App. 453, 462, 970 P.2d 313 (1999), *superseded on other grounds by* RCW 46.61.024.

Having done no empirical studies, Dr. Pratkanis's opinions boiled down to, "I know deception when I see it." Because how a reasonable consumer would read a solicitation is within the average layperson's knowledge, expert testimony on this issue is

not helpful and thus inadmissible. *Kournikova v. Gen. Media Commcns., Inc.*, 278 F. Supp. 2d 1111, 1122 (C.D. Cal. 2003) (holding that expert testimony was inadmissible to establish the effect of a word on reasonable consumers for false-endorsement claim); *see also Waddoups v. Nationwide Life Ins. Co.*, 192 Wn. App. 1078, 2016 WL 1019074 at *21 (2016) (nonprecedential) (affirming superior court's exclusion of expert testimony on whether annuity quote, application, and contract were likely to confuse a reasonable consumer). *See* CP 1009.

Even if Dr. Pratkanis's opinions could properly be considered, they were baseless and internally inconsistent. Ostensibly to support his opinion on capacity to deceive, Dr. Pratkanis cited five elements of LRO's envelope and mailer that in his view mimicked a government document: (1) LRO's name and Olympia return address, (2) the phrase "IMPORTANT PROPERTY INFORMATION" on the envelope, (3) the first-class postage and warning against mail tampering on the envelope, (4) the definitions of legal terms on the back of the mailer, and (5) the reference to a statute in stating, "Local records office operates in accordance to both business and professional code." CP 749-54. But Dr. Pratkanis pointed to no evidence that documents sent by government agencies ever contain such elements or that solicitations ordinarily do not.

Indeed, the State submitted not a single example of a document sent by a government agency for comparison. Dr. Pratkanis conceded he *assumed* that government mailers "kind of looked like the document LRO sent." CP 734. Meanwhile, LRO submitted over two dozen examples of envelopes and stationery used by county and state agencies and divisions, obtained by LRO via public record requests. CP 704, 763-86. None of these even remotely resembled LRO's envelope or mailer. Dr. Bruno noted that mailers from state agencies had a state seal, usually named an elected official, and came from addresses in various Washington cities—not just Olympia. CP 1046-47.

Furthermore, Dr. Pratkanis never pointed to a government agency with a name similar to "Local Records Office" or explained why any reasonable consumer would think this was the name of a government agency. *See* CP 751. Nor did he acknowledge inconsistencies in his opinions. For instance, he asserted that (1) the name "Local Records Office" suggested the mailer came from a *county* agency while the Olympia return address supposedly suggested it came from a *state* agency[5] and (2) recipients would notice minor details such as the return address and first-class postage, yet fail to read the descriptions of LRO's product and service or the multiple prominent disclosures. CP 713, 718, 751.

[5] One of the State's recipient declarants inexplicitly inferred from the name "Local Records Office" that the mailer was from a nonexistent "Washington State Department of Records." CP 637.

The State submitted no empirical evidence that reasonable consumers focus on return addresses or postage.

Another basis for Dr. Pratkanis's opinion that LRO's mailer resembled a government document was that it did not tout the company or its product offering with gimmicks like testimonials, free gifts or trials, price comparisons, or "a persuasive appeal for why the offer is of value to the customer." CP 748-49. But these are not required elements of a mailer, nor are they considered elements of a successful mailer. *See* CP 1036. Dr. Bruno opined that free trials "make no sense in this context" because LRO does not expect to follow up by offering other products or services. CP 1039.

There is nothing inherently deceptive or misleading about a simple, text-only solicitation. Under the First Amendment, advertisers have significant leeway in content and design and are not required to mimic advertisements the government considers typical so that consumers will instantly recognize them as advertisements. *See generally Encyclopaedia Britannica*, 605 F.2d at 972.

The State was not entitled to summary judgment because it failed to establish similarity to a government document such that a reasonable consumer would likely be deceived. *See Consumer Fin. Prot. Bureau v. IrvineWebWorks, Inc.*, 2016 WL 1056662, at *1 (C.D. Cal. 2016) (denying summary judgment

to Bureau on deceptiveness of mailer alleged to misrepresent affiliation with the government, noting that the undisputed facts "merely invite an inference in favor of the Bureau; they do not compel that result").

2. The State failed to establish that LRO's mailer had the capacity to deceive a substantial portion of the public to conclude it was a bill.

In support of the State's related allegation that LRO's mailer had the capacity to deceive a substantial portion of the public to conclude it was a bill, Dr. Pratkanis pointed to the inclusion of information personalized to the recipient, a detachable reply coupon, and the phrase "Please Respond By" followed by a date. CP 751-52. The State offered no evidence that any of these elements were common to bills and not solicitations. In particular, the State offered no support for the notion that any actual bill used the phrase "Please Respond By" and provided no authority that it was deceptive to include a requested response date (it was not a "deadline" as Dr. Pratkanis asserted). CP 751.

Dr. Pratkanis asserted further that LRO's mailer mimicked a bill because it supposedly implied (without actually stating) that the recipient *must* order a copy of a deed from LRO to establish ownership of his or her real property. CP 749. But Dr. Pratkanis pointed to no misleadingly ambiguous statement suggesting as much, and even if he had, a misleadingly

ambiguous statement would not have been a proper basis to grant summary judgment to the State. *See IrvineWebWorks*, 2016 WL 1056662, at *9 (denying summary judgment to the government on misrepresenting an affiliation with the government where "the Bureau has not pointed to any statement[s] made by the Defendants that are objectively false, only statements it contends are misleadingly ambiguous").

3. Neither the response rate nor the asserted worthlessness of LRO's product and service was a proper basis to find capacity to deceive as a matter of law.

Dr. Pratkanis opined that the response rate achieved by LRO's mailer (3.8%) relative to statistics on other mailers (1 to 2%) indicated likely consumer deception. CP 748. But LRO's expert, Dr. Bruno, specifically rebutted this opinion by pointing out that Dr. Pratkanis failed to consider several factors *not* involving deception that could have accounted for the response rate.

For instance, Dr. Bruno explained that the most effective mailers (1) are sent to mailing lists that are current and targeted, (2) include personalization, (3) use a one-step approach to obtain an order, and (4) include a printed response device. CP 1036. LRO's mailer met each of these criteria: LRO sent its mailers to the people most likely to respond, personalized them, requested an order, and included a printed reply coupon and return

envelope. CP 718-19, 1039-40. Thus, that LRO's mailer was somewhat more effective than others does not necessarily indicate, let alone establish, deceptiveness. *See* CP 1040.

The State asserted that every consumer who responded to LRO's mailer was deceived because no reasonable consumer would pay $89 for a copy of a "deed and other public[ly] available information about their property." CP 320. But as Dr. Bruno observed, Dr. Pratkanis made no attempt to determine if consumers placed a value on the property profile or deed and asserted without basis that the information was "similar to things you can Google." CP 1045. And LRO's service provided a value even for consumers only wanting copies of their deeds: convenience. Thousands of Washington consumers purchased LRO's product and service without complaining or requesting a refund. That a miniscule number of these purchasers (a tiny fraction of one percent) complained or requested refunds does not establish as a matter of law that LRO's product and service were worthless or that its mailer was deceptive.

4. Conspicuous disclosures such as those used in LRO's mailer can effectively counter a misleading impression, if any.

The State alleged no false statements in LRO's mailer—only misleading impressions. A misleading impression can be corrected by a clear and conspicuous disclosure. *Encyclopaedia*

Britannica, 605 F.2d at 970-71. Even assuming some consumers could initially view LRO's mailer as resembling a bill from a government agency, no reasonable consumer could be deceived where both the envelope and mailer stated clearly and conspicuously that LRO is *not* a government agency and the mailer is *not* a bill.

Although a "fine print" or "inconspicuous" disclosure may be insufficient to correct a misleading impression, *Panag*, 166 Wn.2d at 50 (citing cases), a disclosure will counter any deception if it is "sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression." *Removatron Int'l*, 884 F.2d at 1497. *See also Kraft, Inc. v. FTC*, 970 F.2d 311, 325-26 (7th Cir. 1992) (affirming FTC order under which advertiser could continue using challenged advertisement so long as it eliminated misleading language "or corrects this inaccurate impression by adding prominent, unambiguous disclosures"); *Encyclopaedia Britannica*, 605 F.2d at 969-71 (affirming FTC orders requiring disclosures to correct misleading impression of non-sales related materials); *Floersheim v. FTC*, 411 F.2d 874, 877 (9th Cir. 1969) (affirming FTC order requiring disclosures to correct misleading impression of a government document).

A clear and conspicuous disclosure is fatal to an allegation that a communication is deceptive. For instance, the court in *Vistaprint* reasoned:

> A consumer cannot decline to read clear and easily understandable terms that are provided on the same webpage in close proximity to the location where the consumer indicates his agreement to those terms and then claim that the webpage, which the consumer has failed to read, is deceptive. ... The VistaPrint Rewards webpage contains adequate disclosures which, if read by the consumer, prevent the webpage—as a matter of law—from being deceptive.

2009 WL 2884727 at *6.

Reasonable minds could conclude that LRO's disclosures were clear and conspicuous.

First, the disclosures were prominently placed both on the envelope and mailer. They were essentially unavoidable to one who read any of the printed text, as any reasonable consumer must.

Second, the disclosures were printed in a format that drew attention to them rather than hid them. They were not in fine print but rather were as large as the other text, and some were in all caps or called out by a box or asterisk.[6]

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[6] Although Dr. Pratkanis criticized LRO for using all caps in some of its disclosures, this is a commonly used device for emphasis. *See, e.g., Encyclopaedia Britannica*, 605 F.2d at 969-71 (affirming FTC order requiring specific disclosures in all caps). Indeed, LRO's mailer was evidently designed with reference to California Business and Professions Code § 17533.6, which requires that a direct-mail solicitation that "reasonably could be interpreted or

Third, the disclosures were printed on the envelope and in multiple locations on both sides of the mailer to ensure they were not missed.

Finally, the disclosures were written in plain, clear language understandable to the ordinary consumer.[7] *See* CP 713, 718-19.

The State failed to establish as a matter of law that LRO's mailer had the capacity to deceive a substantial portion of the public to conclude it was from the government or was a bill. On this record, and particularly given the conflicting expert opinions (assuming Dr. Pratkanis's opinions were admissible; if not, there was no conflict), reasonable minds could find that it lacked such capacity. And even though it would not be admissible in a trial,

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construed" as having a connection with the government must "conspicuously display" the following disclosure (in all caps): "THIS PRODUCT OR SERVICE HAS NOT BEEN APPROVED OR ENDORSED BY ANY GOVERNMENTAL AGENCY, AND THIS OFFER IS NOT BEING MADE BY AN AGENCY OF THE GOVERNMENT." CAL. BUS. PROF. CODE § 17533.6(c)(2)(A)(i). In addition, the envelope must include the words, "THIS IS NOT A GOVERNMENT DOCUMENT." CAL. BUS. PROF. CODE § 17533.6(c)(2)(A)(ii). Although Washington has not adopted a similar law, it does require the use of all caps in many other contexts. *See, e.g.,* RCW 61.34.110(1)-(2) (notice of distressed homeowner's right to cancel); RCW 19.225.060(3) (notice to student athlete in agency contract); RCW 19.142.050 (notice of nonrefundable fee for health club membership); RCW 19.186.020(9) (notice of customer's right to cancel contract for roofing or siding). One of LRO's disclosures was written in sentence case. CP 719.

[7] The FTC has identified these as elements of effective disclosures. *See* FTC Enforcement Policy Statement on Deceptively Formatted Advertisements at 13-14 (December 22, 2015), available at https://goo.gl/1ppAoN; FTC Policy Statement on Deception (October 14, 1983), available at https://goo.gl/TY5Ldc.

the 2014 Indiana bench verdict that LRO's mailers were not deceptive further demonstrates for summary-judgment purposes that reasonable minds could find that LRO's mailer lacked the capacity to deceive a substantial portion of the public.[8] CP 994-1007. Granting the State summary judgment was error.

D. LRO is entitled to judgment as a matter of law that its mailer lacked the capacity to deceive a substantial portion of the public that it was from a government agency or was a bill.

Not only did the superior court err in granting the State summary judgment, it erred in denying LRO's motion for partial summary judgment because no reasonable trier of fact could conclude that either the text or design of LRO's mailer had the capacity to deceive a substantial portion of the public to conclude it was a government document or a bill.

LRO's mailer neither stated nor reasonably implied that it was a bill from a government agency or anyone else. Indeed, it expressly stated the opposite—without any false statements, misleading ambiguities, or half-truths. Even assuming certain elements of the mailer could be said to create a misleading

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[8] Although not binding or admissible, a court may consider unpublished decisions in other cases for purposes other than to prove a fact or establish a precedent. *See M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.3d 1483, 1491 (9th Cir. 1983). The hearsay rule does not apply because the decision is not being considered to prove a fact. But even if the hearsay rule would otherwise apply, the Indiana ruling would not be hearsay because it is not being offered to prove the truth of the matter asserted, *i.e.*, lack of deceptiveness, but only to demonstrate that reasonable minds could differ. *See* ER 801(c).

impression, its disclosures were clear and conspicuous and sufficient as a matter of law to alert consumers that LRO's mailer was a solicitation, such that consumers who did not read the disclosures cannot be heard to complain that the mailer was deceptive. *See Baxter*, 2010 WL 3791487 at *4; *In re Vistaprint Corp.*, 2009 WL 2884727 at *4-8.

Neither the State's recipient declarations (mainly from people who did not read the solicitation or were not deceived) nor Dr. Pratkanis's inadmissible, baseless opinions created a genuine issue of material fact on capacity to deceive. This Court can and should conclude as a matter of law that LRO's mailer was not deceptive under RCW 19.86.020 in that it lacked the capacity to deceive a substantial portion of the public to conclude it was from a government agency or was a bill. This Court should thus direct entry of summary judgment in favor of LRO and the Romeros. *See Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992).

E. If this Court affirms the determination of CPA violations, it should vacate the penalties in part because the superior court abused its discretion in imposing a $10 penalty for each mailer discarded by a consumer without responding.

Neither the State nor the superior court articulated any rational basis for imposing a $10 penalty for each mailer, regardless of whether the recipient responded to LRO. Of the

total 256,998 mailers sent, 247,303 (over 96%) were discarded without a response, presumably because the recipients correctly understood the mailer to be a solicitation and did not want to purchase LRO's offering. Although the State pointed out that consumers who did not respond may have spent time (probably seconds) reviewing the mailer, again, it is not unlawful to send a solicitation via direct mail, even if it takes time to review.

The superior court determined the penalties with reference to the factors articulated in *United States v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 967 (3d Cir. 1981) (not adopted in Washington): (1) the defendant's good or bad faith; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the agency's authority. These factors did not support imposition of penalties here, particularly for the discarded mailers.

First, there was significant evidence of LRO's good faith.[9] Mr. Romero testified in deposition that LRO's mailer was designed to avoid confusion: "For me it was very important that there was no doubts when they received the document what it was, and by no means do I want any kind of confusion." CP 873.

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[9] In exercising its discretion to set the penalties, the superior court should have held a trial to determine any pertinent material fact issues, including whether LRO and Mr. Romero acted in good faith. *See Ripley v. Grays Harbor County*, 107 Wn. App. 575, 584, 27 P.3d 1197 (2001) (analyzing as a question of fact whether a party acted in good faith).

He further testified to lack of any intent to deceive in using a mailbox in the state capitol, providing an innocent explanation of how doing so facilitated selection of a location. CP 918-20. As further evidence of good faith, consumers who requested refunds received them promptly, without hassle or delay. *See, e.g.,* CP 487-90, 617, 620, 635, 646, 649, 658, 661, 667, 674, 687, 702.

In addition, LRO's inclusion of multiple disclosures that are prominently placed, plainly worded, and not misleading evidences a good faith effort to avoid confusion. Two of the disclosures included language specifically required by California Business and Professions Code § 17533.6 for any direct-mail solicitation that "reasonably could be interpreted or construed" as having a connection with the government: the back side of the mailer stated, "THIS PRODUCT OR SERVICE HAS NOT BEEN APPROVED OR ENDORSED BY ANY GOVERNMENTAL AGENCY, AND THIS OFFER IS NOT BEING MADE BY AN AGENCY OF THE GOVERNMENT," and the envelope stated, "THIS IS NOT A GOVERNMENT DOCUMENT." CAL. BUS. PROF. CODE § 17533.6(c)(2)(A)(i), (ii).

As to the remaining *Reader's Digest* factors: (2) there was no evidence of appreciable injury to anyone who did not respond to the mailer; (3) the ability of LRO and Mr. Romero to pay, although not specifically quantified, plainly would not compare with that of Reader's Digest, which was assessed a penalty of

about 10 cents per violation for conduct more egregious than LRO's[10]; (4) LRO incurred costs but received no benefit from discarded mailers, and the restitution fund of $856,981 ($89 per consumer who responded and had not previously requested and received a refund) fully eliminated the benefits LRO derived from sales, CP 1309; and (5) the attorney general's authority was vindicated by the remaining imposed penalty of $10 per recipient who responded, in addition to the restitution fund, which together amount to $953,931, plus fees and costs.

Hence, this Court should vacate the penalties imposed for the discarded mailers.

V. CONCLUSION

Because a reasonable trier of fact applying the correct legal standard could conclude only that LRO's mailer did *not* have the capacity to deceive a substantial portion of the public to conclude it was from a government agency or was a bill, this Court should reverse the judgment and remand for entry of summary judgment in favor of LRO and the Romeros.

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[10] In *Reader's Digest*, the defendant violated an existing order proscribing the conduct at issue. 662 F.2d at 967-68. In addition, the defendant had obtained more than $5 million in gross revenues from its promotions—5.8 times the amount received by LRO. *Id.* at 969. The penalty was imposed under a statute authorizing a fine of up to $10,000 per violation, in contrast to the $2,000 maximum under the CPA. *Id.* at 966.

Respectfully submitted this 21st day of December, 2016.

CARNEY BADLEY SPELLMAN, P.S.

By _____
Jason W. Anderson, WSBA No. 30512
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document and the *Verbatim Report of Proceedings* on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

John A. Nelson
Office of the Attorney General
800 5th Ave Ste 2000
Seattle WA 98104-3188
Johnn2@atg.wa.gov

DATED this 21st day of December, 2016.

Patti Saiden

Patti Saiden, Legal Assistant

APPENDIX A

LOCAL RECORDS OFFICE
1001 Cooper Pt Rd SW, #140 #117
Olympia, WA 98502

IMPORTANT PROPERTY INFORMATION
RESPOND PROMPTLY

PRESORTED
FIRST-CLASS MAIL
U.S. POSTAGE PAID
PBFS

WARNING:
$2,000 FINE, 5 YEARS IMPRISONMENT
OR BOTH FOR ANY PERSON INTERFERING
OR OBSTRUCTING WITH DELIVERY OF
THIS LETTER U.S. MAIL TIT.18 SEC 1702 U.S. CODE
THIS IS NOT A GOVERNMENT DOCUMENT.

23 HBG-GP1 98367

LOCAL RECORDS OFFICE
1001 Cooper Pt Rd. SW, #140 #117
Olympia, WA 98502
Phone: (800) 775-9059

THIS SERVICE TO OBTAIN A COPY OF YOUR DEED OR OTHER RECORD OF TITLE IS NOT ASSOCIATED WITH ANY GOVERNMENTAL AGENCY. YOU CAN OBTAIN A COPY OF YOUR DEED OR OTHER RECORD OF YOUR TITLE FROM THE COUNTY RECORDER IN THE COUNTY WHERE YOUR PROPERTY IS LOCATED.

********LRO WUA27460409 DIGIT-488

[redacted]
Snohomish, WA 98296

Please Respond By:
05/14/2013

LOCAL RECORDS OFFICE

Local Records Office provides a copy of the only document that identifies [redacted] as the property owner of [redacted] by a recently recorded transferred title on the property.

Local Records Office provides a property profile where you can find the property address, owner's name, comparable values, and legal description or parcel identification number, property history, neighborhood demographics, public and private schools report.

Records obtained through public information show a deed was recorded in your name [redacted] on 2013-03-20 which indicates your ownership and interest in the specified property below..

SNOHOMISH COUNTY PUBLIC INFORMATION

Legal Property Address: [redacted] *Snohomish WA 98296*

Purchase or Transfer Date:	2013-03-20	Year Built:	2005	Property ID:	[redacted]
Doc Number:	[redacted]	Lot Sq Ft:	N/A	Improvements:	$0
Sale Amount	N/A	Square Feet:	1121 SF	Use Code:	1004
Assessed Value:	N/A	Pool:	N/A	Property Zone	N/A

For a complete property profile and an additional copy the only document that identifies you as a property owner usually called deed, please detach coupon and return with an $89 processing fee in the envelope provided. You will receive your documents and report within 21 business days.

Upon receipt of your processing fee, your request will be submitted for documents preparation and reviewed. If for any reason your request for deed and property profile cannot be obtained, your processing fee will be immediately refunded.

LOCAL RECORDS OFFICE IS NOT AFFILIATED WITH THE COUNTY IN WHICH YOUR DEED IS FILED IN, NOR AFFILIATED WITH ANY GOVERNMENT AGENCIES. THIS OFFER SERVES AS A SOLICITING FOR SERVICES AND NOT TO BE INTERPRETED AS BILL DUE. THIS PRODUCT OR SERVICE HAS NOT BEEN APPROVED OR ENDORSED BY ANY GOVERNMENTAL AGENCY, AND THIS OFFER IS NOT BEING MADE BY AN AGENCY OF GOVERNMENT. THIS IS NOT A BILL THIS IS A SOLICITATION YOU ARE UNDER NO OBLIGATION TO PAY THE AMOUNT STATED, UNLESS YOU ACCEPT THIS OFFER.

Please detach coupon and mail with your check

CODE: WUA27460409

PROPERTY ID NO	SERVICE FEE	PLEASE RESPOND BY	CHECK NO.
929700100200	$ 89.00	05/14/2013	

[redacted]
Snohomish, WA 98296

☐ *Please check box if your mailing address is different and print mailing address on reverse side.*

MAKE CHECK PAYABLE TO:

LOCAL RECORDS OFFICE
1001 Cooper Pt Rd. SW, #140 #117
Olympia, WA 98502

Your Phone Number: (_____)_____
Please write the PROPERTY ID NO. On the lower left corner of your check.

[redacted]

Local Records Office: In the United State anyone can have access to the records of any Real Property. The Real Property is usually recorded in the County records where Local Records Office runs powerful on-line searches to find the Deed of millions of people throughout The United States and gathers at the same time several Characteristics of the property such as: Property Characteristics, Property History, Sale Loan Amount, Assessment and Tax Information, Nearby Neighbors, Comparable Sale Date, Neighborhood Demographics, Private and Public Schools reports, Plat Map, and others. Those are sent to thousands of new property owners.

Real property is property that includes land and buildings, and anything affixed to the land. Real property only includes those structures that are affixed to the land, not those which can be removed, such as equipment.

Real Property Records are generally filed with and kept on a county level; they originate from two major governmental sources: County Recorder's or Courthouse and Property (Tax) Assessor's offices.

Property Title refers to a formal document that serves as evidence of ownership. Conveyance of the document may be required in order to transfer ownership in the property to another person. Title is distinct from possession, a right that often accompanies ownership but is not necessarily sufficient to prove it. In many cases, both possession and title may be transferred independently of each other.

Property deeds are legal instruments that are used to assign ownership of real property, to transfer title to the land and its improvements such as a house. Words used to convey property transfer may be grant, assign, convey or warrant, but they basically all do the same thing, they transfer the interest of the person selling the house to the person buying the house.

Types of property ownership:

a) Sole Ownership: The simplest form of property ownership, sole ownership grants one individual complete rights over the property in question.

b) Tenancy by the Entireties: When a married couple purchases real estate together, they are granted tenancy by the entireties by many states. This means that each party holds one-half interest in the property, but neither can dispose of or otherwise abridge the right of the other to the property.

c) Tenancy in Common: This form of ownership allows multiple people to own a percentage of the same property. While the percentage owned may vary, each person has an equal right to the property during their lifetime. If one of the tenants in common dies, their interest in the property passes to their heirs; it does not devolve to the other tenants in common.

d) Joint Tenancy: Joint tenancy agreements require that four conditions be met: ownership must be received at the same time, tenants must hold an equal interest, tenants must each be named on the title, and all must have exactly the same rights of possession. Unlike tenants in common, joint tenants have right of survivorship; the ownership of the property passes to the remaining joint tenants in the event of the death of one of the owners. One joint tenant can buy out another, or legal proceedings can be instituted to dissolve the joint tenancy. If one participant sells his or her interest in the property to another person, the joint tenancy is converted into a tenancy in common, and the right of survivorship is no longer valid; the other tenants have no recourse against this action by one or more of their number.

e) Community Property: In some states, real estate purchased by a married couple becomes community property. This form of ownership basically creates a condition where the real estate (and other property, if applicable) is owned by the partnership created by the marriage. If the marriage is dissolved through divorce, the value of the property must be divided between the partners. Community property ownership may give right of survivorship, essentially giving the entirety of the property to the surviving spouse in the event of death; other forms allow the partners to leave their interest in the property to their heirs after they die.

f) Tenancy in Severalty: Absolute and sole ownership of property by a legal entity, without cotenants, joint-tenants, or partners.

DISCLAIMER: * Local Records Office is not affiliated with any State or the United States or the County Records. Local Records Office is an analysis and retrieval firm that uses multiple resources that provide supporting values, deeds and evidence that is used to execute a property reports and deliver a requested deed.
Local Records Office is not affiliated with the county in which your deed is filed in, nor affiliated with any government agencies. This offer serves as a soliciting for services and not to be interpreted as bill due.
This Service to obtain a copy of your Deed or other record of Title is not Associated with any Governmental Agency. You can obtain a Copy of your Deed or other Record of your Title from the County Recorder in the County where your property is Located In the price varies depending on each county rate. This product or service has not been approved, or endorsed by any government agency, and this offer is not being made by agency of government. This is not a bill. This is a solicitation; you are under no obligation to pay the amount stated, unless you accept this offer. Local records office operates in accordance to both business and professions code.

Mailing Address		
Address:		
City:	*State:*	*Zip Code:*

LRO 100005

CARNEY BADLEY SPELLMAN

December 21, 2016 - 11:50 AM

Transmittal Letter

Document Uploaded: 1-489708-Appellants' Brief.PDF

Case Name: State of WA v. LA Investors, LLC
Court of Appeals Case Number: 48970-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patti Saiden - Email: saiden@carneylaw.com

A copy of this document has been emailed to the following addresses:

anderson@carneylaw.com